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Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

_____ TERM, 1990

JAMES HAYTON,

PETITIONER,

vs

HENRY GRAYSON,

RESPONDENT,

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

JAMES HAYTON

Petitioner In Pro Per

119908

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QUESTIONS FOR REVIEW

1. The District Court and Sixth Circuit Court of Appeals abused their discretion when they dismissed and affirmed the great writ within the discretion of Rule 9(b) and the District Court held that it has not been shown that petitioner diliberately failed to raise claims A, B, C and E, and the issues of this appeal were never considered by either courts.
2. Petitioner was prejudiced when the trial court did not instruct the jurors on the essential elements for the underlying charge of armed robbery in the first degree murder case, in violation of a constitutional right.
3. The jurors were not instructed on the use of evidence, direct or circumstantial in violation of the Due Process Clause.
4. When the prosecution failed to produce excluptory evidence that would have proven

petitioner was not the perpetrator violated petitioner's constitutional right by denial of due process of law.

5. Petitioner was denied effective assistance of counsel within the counselor's clause of the Sixth Amendment, and by the ineffectiveness prejudice was shown.

TABLE OF CONTENTS

Questions Presented..... i

Table of Authorities..... iv

Opinion Below..... vi

I Grounds for jurisdiction of the Supreme Court..... 1

II Constitutional and Statutory Provisions..... 1

III Statement of the Case arguments... 3

IV It has not been shown that petitioner delibertely failed to raise claims..... 5

V The trial court did not instruct the jurors..... 7

VI The jurors were not properly instructed on the use of evidence 10

VII The prosecution failed to produce exculptory evidence..... 10

VIII Petitioner was denied effective assistance of counsel..... 11

IX Conclusion..... 14

Appendix..... A1

TABLE OF AUTHORITIES

CASES, STATE

People vs Aaron 8
409 Mich 516 (1981)

People vs Hatch 10
126 Mich App 399 (1982)

People v Lewis 8
91 Mich App 542 (1979)

People vs Whetstone 8
(on remand) 131 Mich App 676

CASES, FEDERAL

Anderson vs Harless 6
459 U.S. at 8 (1982)

Brewer vs Williams 12
430 U.S. 387; 97 S. Ct. 1232

Brady vs Maryland 4, 11
373 U.S. 742 (1963)

Chapman vs California 13
386 U.S. 18; 23, 43; 87 S. Ct. 824;
17 L. Ed 2d 705 (1942)

Cupp vs Naughter 10
414 U.S. 141 (1972)

Cuyler vs Sullivan 13
466 U.S. at 344; 64 L. Ed 2d 333;
100 S. Ct. 1708

Evitts vs Lucey 5
469 U.S. ____; 105 S. Ct. 830

Glenn vs Dallman 7
686 F.2d 418 (CA 6, 1982)

Glasser vs United States 13
315 U.S. 60; 62 S. Ct. 457;
86 L. Ed 2d 680

Haley vs Estelle
632 F.2d at 1276 6

Hayton vs Egeler
555 F.2d 599, 605 (CA 6, 1977) 3

Hoover vs Garfield Heights Mun. Court
802 F.2d 168 9

Jones vs Estelle
722 F.2d 159 6

Lanberger vs Marshall
808 F.2d 1169 (CA 6, 1982) 7

Mempa vs Rhay
389 U.S. 128; 88 S. Ct. 254 12

Strickland vs Washington
466 U.S. 668; 104 S. Ct. 2052;
80 L. Ed 2d 674 (1984) 13

Townsend vs Sains
372 U.S. 293 (1963) 11

United States vs Wade
388 U.S. 218 (1967) 4

In re Winship
397 U.S. 358; 90 S. Ct. 1072 (1970) 9

350 U.S. at 90; 76 S. Ct. at 171 12

UNITED STATES CONSTITUTION

Amendment Five 2

Amendment Six 2, 3, 10

Amendment Fourteenth 1,11

PROVISIONS

Fed. R. Crim P.44 12

18 U.S.C. § 3006A 12

OPINIONS BELOW

The opinion of the Court of Appeals for the Sixth Circuit is attached hereto as Appendix C. The order of dismissal by the United States District Court, Eastern District of Michigan is attached hereto as Appendix B. The judgement by the United States District Court, Eastern District of Michigan is attached hereto as Appendix A.

On May 22, 1989, U.S. District Court, Eastern District of Michigan, Southern Division, dismised the writ of habeas corpus pursuant to 28 U.S.C. § 2254. On September 25, 1989, the Sixth Circuit Court of Appeals denied petitioner's certificate of probable cause pursuant to Fed. R. App. P. 22(b).

The Supreme Court of the United States has jurisdiction to review the Judgment in question under 28 U.S.C. §1254(1).

II

CONSTITUTIONS

1. Fourteenth Amendment to the United States Constitution:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property,

without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

2. Fifth Amendment to the United States Constitution:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelied in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without due compensation.

3. Sixth Amendment to the United States Constitution:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and

shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

III

STATEMENT OF THE CASE

Petitioner James Hayton was charged with and convicted of first degree murder in the State of Michigan. Petitioner was sentenced on June 26, 1968 to a term of "life" imprisonment without the possibility of parole.

The case against petitioner was purely circumstantial evidence. The co-defendant was acquitted by the same jurors that convicted petitioner. Hayton vs Egeler, 555 F2d 599, 605 (CA 6, 1977). Petitioner did testify at trial and denied any participation in the homicide/robbery.

The trial judge failed to instruct the jurors on the essential elements of armed rob-

bery. The District Court, nor the Sixth Circuit addressed any of the issues submitted by petitioner, nor address the merits of those claims. The prosecution was relieved of proving petitioner guilty beyond a reasonable doubt.

The trial judge failed to instruct the jurors on the use of evidence, to relate the facts of the case, to the essential elements of the crime.

At trial, George Rick Jr. or no one else ever hinted that there were other suspects. Courts have recognized inherent unreliablity of eyewitness identification. United States vs Wade, 388 U.S. 218 (1967).

There was one unidentified witness, who called the State Police and stated that they knew who the perpetrator was. This person was never tried or arrested for the herein homicide, and he was not at petitioner's trial. This violated the mandates of Brady vs Maryland, 373 U.S. 742 (1963).

The District Court stated that because

petitioner had raised the Sixth Amendment issue previously, with different issues within, that this issue was a successive petition and not reviewable. Order of Dismissal, dated May 21, 1989.

Petitioner's trial counsel was ineffective within the Sixth Amendment, counselor clause.

Appellate counsel was ineffective for not raising the herein issues in petitioner's appeal as of right. Evitts vs Lucey, 469 U.S. _____; 105 S. Ct. 830 (1985).

The District Court ruled that this issue was waived, because petitioner "cannot contend that ineffective assistance of appellate counsel was unknown to him at the time he filed his second petition because he had already presented it to the Michigan Appellate Courts".

IV

IT HAS NOT BEEN SHOWN THAT PETITIONER DELIBERATELY FAILED TO RAISE CLAIMS

The District Court stated when dismissing:

> "While it has not been shown that petitioner deliberately failed to raise claims

> A, B, C and E in either of his first or second habeas petition, it is clear that he was at the very least "inexcusable neglectful" in omitting those claims".

Inexcusable neglectful has been defined as Haley vs Estelle, 632 F2d at 1276:

> "Petitioner should not be penalized because his inexperience in jurisprudence left him unaware of claims he had not considered at the time of his first application for habeas corpus".

additionally:

> "Inexcusable neglectful cannot be charged with having abused the writ of habeas corpus if, at the time of his earlier petition, he was unaware of the facts on which his newly asserted claims are based, or was unaware that those facts constitute a basis for which federal habeas corpus relief could be granted. Thus the petititioner may have adequate reasons for not presenting his claims earlier".

The District Court concluded that "it has not been shown that petitioner deliberately failed to raise claims A, B, C and E.

This Court has held that Michigan does not have a rule of finality. Anderson vs Harless, 459 U.S. at 8 (1982). Petitioner did have counsel for his appeal as of right, and was held to the decision of his lawyers. Jones vs Estelle, 722 F2d 159.

The Sixth Circuit in Lanberger vs Marshall, 808 F2d 1169 (CA 6, 1987), held that Rule 9 had been violated, but the court still considered the merits of the case, Id at 1174. In petitioner's case, the lower court did not consider the merits of the issues submitted.

Petitioner is also raising the issue that his former appellate counsel was ineffective for not raising the herein issues.

That the District Court and the Sixth Circuit Court of Appeals abused their discretion when dismissing the petition.

V

THE TRIAL COURT DID NOT

INSTRUCT THE JURORS

Petitioner was convicted of first degree murder and armed robbery being the underlying charge. Michigan's first degree murder statute provides:

> "all murder...which shall be committed in the perpetration, or attempt to perpetrate any arson, rape or robbery... shall be murder of the first degree. MCL 750.316; MSA 28.548.

The Sixth Circuit stated in Glenn vs Dallman, 686 F2d 418 (CA 6, 1982):

> "Where a jury sits as the finders of facts in a criminal trial, the court's instruction to the crime charge are the only means of assuring that the state is put to its burden of establishing every elements of the crime".

Michigan Courts have held similarly. In People vs Whetstone, (on remand) 131 Mich App 676, citing People vs Lewis, 91 Mich App 542 (1979):

> "The instant jury was not instructed as to the elements of assault with intent to do great bodily harm less than murder, if a jury is not instructed on less included offenses, such offenses are, for all practical purposes, excluded from the jury's consideration. By rendering a verdict absent any instruction by the court as to the elements of the crime, the jury impermissibly usurped the function of the trial judge".

In order to determine if an armed robbery occured, the jurors must consider the essential elements of armed robbery. Then and only then, can the jurors conclude if the underlying felony occured. If the jury concludes that the murder occured in the perpetration of an armed robbery, then the murder becomes first degree. People vs Aaron, 409 Mich 516 (1981).

By the jury not being instructed on armed robbery, relieved the prosecution from his bur-

den of proving petitioner's guilt beyond a reasonable doubt. The Supreme Court has on several occasions held that, in a criminal trial, the prosecution bears the absolute burden of proof on all essential elements of the charged offense, and that any statute or instruction which relieves the prosecution of this duty violates due process. In re Winship, 397 U.S. 358; 90 S. Ct. 1072 (1970):

> "Less there remain any doubt about the constitution status of the reasonable doubt standards, we explicity hold that the due process clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged".

The Sixth Circuit in Hoover vs Garfield Heights Mun. Court, 802 F2d 168 held:

> "The trial court's failure to instruct that the state had to prove the element of lawful arrest violated the due process principle that no one may be convicted of a crime absent proof of every fact necessary to constitute the crime beyond a reasonable doubt".

By the jurors not being instructed on any of the essential elements for armed robbery in this murder case, the ailing instruction by itself so infected the entire trial that the

resulting conviction violates due process. Cupp vs Naughter, 414 U.S. 141 (1973). In violation of the Sixth Amendment, a fair and impartial trial.

VI

THE JURORS WERE NOT PROPERLY INSTRUCTED ON THE USE OF EVIDENCE

The record is barren of instruction that the trial court failed in administrating, on evidence. When this isssue was submitted to the court, the prosecution answered that "the People of the State of Michigan neither admit or deny that it is reversible error to omit the jury instruction involving evidence".

The trial judge had the sua sponte duty to instruct the jurors on the use of evidence, is to resolve conflicts in evidence and reasonable doubt in the favor of the petitioner. People vs Hatch, 126 Mich App 399 (1982).

VII

THE PROSECUTION FAILED TO PRODUCE EXCULPTORY EVIDENCE

The prosecutor had a sua sponte duty to

produce all exculptory evidence that is known to him at trial and to furnish this evidence to petitioner and his counsel. Brady vs Maryland, 373 U.S. 742 (1963).

The exculptory evidence was, a witness who saw the two white males at the scene of the homicide. The two males that the witness saw, was neither the petitioner or co-defendant according to the description.

The only evidence that convicted petitioner was George Rick Jr. who identified petitioner and co-defendant. Yet the co-defendant was acquitted by the jury. Petitioner was arrested many months after the homicide occured. tt 257.

An evidentary hearing is prayed for on this issue. Townsend vs Sains, 372 U.S. 293 (1963).

VIII

PETITIONER WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL

The right to counsel is a constitutional right, guaranteed by the Sixth and Fourteenth Amendment to the United States Constitution, and as well by court rule (Fed. R. Crim. P.

44) and statute 18 U.S.C. § 3006A. The extent of this right extends from time that judicial proceedings has been initiated against the accused, whether by way of formal charges, preliminary hearing, indictment, information, or arraignment (Brewer vs Williams, 430 U.S. 387; 97 S. Ct. 1232), through to sentencing (Mempa vs Rhay, 389 U.S. 128; 88 S. Ct. 254).

Petitioner's counsel's performance was deficient when he failed to bring the court's attention, the negligence to instruct the jurors on essential elements on the underlying charge, armed robbery. Raising the issue that the jurors was not instructed on the use of evidence, direct or circumstantial. Counsel did not investigate or discover the police reports containing exculptory evidence.

The Supreme Court has held that "the effective assistance of counsel...is a constitutional requirement of due process which no member of the Union may disregard", 350 U.S. at 90; 76 S. Ct. at 171. The Supreme Court's opinion leaves no doubt that evidence of incompetence as such and basic procedural errors should be

considered in determing whether a defendant's assistance of counsel has been constitutionally adequate.

Counsel, however, can also deprive a defendant of the right of effective assistance, simply by failure to render adequate legal assistance, such as to not raise objections or draw attention when the trial judge delets instructions, improperly and unfairly with prejudice, in violation of a constitutional right. Cuyler vs Sullivan, 446 U.S. at 344; 64 L. Ed 2d 333; 100 S. Ct. 1708.

That due process provisons of the Fourteenth Amendment entitles a criminal defendant to the effective assistance of counsel. Harmless error test do not apply in regard to the deprivation of a procedural right so fundamental as the effective assistance of counsel. Chapman vs California, 386 U.S. 18; 87 S. Ct. 824; 17 L. Ed 2d 705 (1967); Glasser vs United States, 315 U.S. 60; 62 S. Ct. 457; 86 L. Ed 2d 680 (1942); Strickland vs Washington, 466 U.S. 668; 104 S. Ct. 2052; 80 L. Ed 2d 674 (1984).

CONCLUSION

WHEREFORE, it is prayed that this Petition for Writ of Certiorari be granted, and a hearing be had in the Supreme Court of the United States, to review the judgment of the United States Court of Appeals for the Sixth Circuit. That this honorable Court has the authority to Order without infringing, to maintain value structure of the United States Constitution since this Court, all State Supreme Courts and all Appellate Courts are guardians.

Respectfully Submitted

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In Pro Se

JUL 18 1990

APPENDIX

APPENDIX

		PAGE
A	Judgement, United States District Court, Eastern District of Michigan May 23rd, 1989	A1
B	Order of Dismissal, U.S. District Court Eastern District of Michigan May 22nd, 1989	A3
C	Sixth Circuit Court of Appeals denial for certificate of probable cause September 25, 1989	A12

APPENDIX A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

No. 88CV-72323-DT

JAMES EDWARD HAYTON,
Petitioner,

vs

HENRY GRAYSON,
Respondent,

Before John Feikens, Judge, U.S. District Court for the Eastern District of Michigan

---

JUDGMENT

The above-entitled matter having come before the Court on a Petition for a Writ of Habeas Corpus, Honorable John Feikens, United States District Judge, presiding and in accordance with the Order of Dismissal entered on May 23, 1989.

IT IS ORDERED AND ADJUDGED that the Petition for Writ of Habeas Corpus be, and the same hereby is DISMISSED.

Dated at Detroit, Michigan, this 23rd day of May, 1989.

_____

John Feikens
U.S. District Judge
U.S. District Court for
the Eastern District

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

No. 88CV-72323-DT

JAMES EDWARD HAYTON,
Petitioner,

vs

HENRY GRAYSON,
Respondent,

May 22, 1989

ORDER OF DISMISSAL

Petitioner, James Edward Hayton, presently confined at the Egeler Correctional Facility in Jackson, Michigan, has filed this pro se application for writ of habeas corpus pursuant to 28 U.S.C. § 2254. On June 26, 1968, he was sentenced to life imprisonment following a jury conviction in the Livingston County Circuit Court for first degree felony murder. Petitioner has sought a new trial and/or reversal of his conviction by the trial court, the Michigan appellate courts, and this Court (the United States District Court for the Eastern District of Mich-

igan) on eighteen different occasions.

The Livingston County Circuit Court denied four motions for new trial in orders dated June 28, 1971, September 11, 1978, January 14, 1985, and January 20, 1987,[1] respectively. See Docket No. C-352. On appeal as of right, the Michigan Court of Appeals affirmed the conviction. See People vs Hayton, 28 Mich App 673 (1970), Lv. to app. denied, 384 Mich 825 (1971). The Michigan Court of Appeals also denied four delayed applications for leave to appeal in four standard orders. See Docket No. 12198, order dated September 22, 1971; Docket No. 78-3705, order dated November 15, 1978; Docket No. 86332, order dated November 6, 1985; and Docket No. 98363, order dated August 28, 1987. The Michigan Supreme Court likewise denied four delayed applications for leave to appeal and a request for leave to appeal and a request for rehearing in five standard orders. See Docket No. 53708

---

1 Petitioner filed two motions on May 12, 1986 and August 14, 1986. The trial court decided both motions at the same time in 1987.

order dated December 14, 1971; Docket No. 62394 order dated July 6, 1979; Docket No. 77677, order dated April 28, 1986; and Docket No. 81771, order dated February 17, 1988 and rehearing denied in order dated April 25, 1988.

Petitioner also proveiously filed in this Court two applications for habeas corpus relief. Both applications were decided on the merits and relief was denied. See Hayton vs Egeler, 405 F. Supp 1133 (E.D. Mich 1975), aff'd, 555 F.2d 599 (6th Cir.), cert. denied, 434 U.S. 973 (1977); and Hayton vs Anderson, No. 79-72921 (E.D. Mich. Mar. 24, 1980), aff'd, 636 F.2d 1217 (6th Cir. 1980), cert. denied, 450 U.S. 1002 (1981). He filed the current petition for writ of habeas corpus on June 3, 1988. Petitioner raised six claims for relief:

A. The trial court erroneously failed to instruct the jury on the elements of armed robbery;

B. The trial court failed to instruct the jury on how to evaluate direct and circumstantial evidence;

C. The prosecutor failed to indorse on the information and produce at trial res gestae witnesses favorable to the defense:

D. Petitioner was prejudiced because he did not receive a copy of the jury voir dire transcript;

E. Petitioner was denied effective assistance of trial counsel; and

F. Petitioner was denied effective assistance of appellate counsel.

Petitioner's instant application for habeas relief must be dismissed pursuant to Rule 9(b) of the Rules Governing Section 2254 Cases in the United States District Courts. Rule 9(b) provides:

> A second or successive petition may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ.

In dealing with the problem of successive applications, the Supreme Court, in Sanders vs United States, 373 U.S. 1 (1963), stated:

> Controlling weight may be given to denial of a prior application for federal habeas corpus... relief only if (1) the same ground presented in the subsequent application was determined adversely to the applicant on the prior application, (2) the prior determination was on the merits, and (3) the ends of justice would not be served by reaching the merits of the subsequent application.

Id. at 15. (Footnote omitted).

The Court noted, with reference to a successive application asserting new grounds or grounds not previously decided on the merits:

> In either case, full consideration of the merits of the new application can be avoided only if there has been an abuse of the writ. . . and this the Government has the burden of pleading. . .
>
> . . . Thus, for example, if a prisoner deliberately withholds one of two grounds for federal collateral relief at the time of filing his first application, in the hope of being granted two hearings rather than one or for some other such reason, he may be deemed to have waived his right to a hearing on a second application presenting the withheld ground. . . .

Id. at 17-18. Rule 9(b) has incorporated this principle and requires that the Petitioner's failure to have asserted the new grounds in a prior petition be deliberate or "inexcusably neglectful". Haley vs Estelle, 632 F. 2d 1273, 1275 (5th Cir. 1980). See also Wong Doo vs United States, 265 U.S. 239 (1924). The petitioner has the overall burden of proving that he has not abused the writ. Price vs Johnston, 334 U.S. 266, 292 (1948).

In Jones vs Estelle, 722 F.2d 159 (5th Cir. 1983), cert. denied, 466 U.S. 976 (1984), the Court stated the purpose of Rule 9(b):

> The objective is to preserve the proper use of writ of habeas corpus to win review of unlawful state action, while recognizing that "[t]he advancing of grounds for relief in a one-at-a-time fashion when the evidence is available which would allow all grounds to be heard and disposed of in one proceeding, is an intolerable abuse of the Great Writ", Fulford vs Smith, 432 F.2d 1225 (5th Cir. 1970).

Id. at 164-65. A dismissal pursuant to Rule 9(b0 lies within the trial judge's discretion. Lonberger vs Marshall, 808 F.2d 1169, 1173 (6th Cir.), cert. denied, 481 U.S. 1055 (1987). See generally, sanders vs United States, 373 U.S. 1, 18 (1963).

This Court agrees with Respondent that Petitioner previously raised claim D, regarding the jury voir dire transcript, in his first habeas petition and received an adverse determination on the merits. See Hayton vs Egeler, 405 F. Supp 1133 (E.D. Mich 1975), aff'd, 555 F.2d 599 (6th Cir.), cert. denied, 434 U.S. 973 (1977). Respondent also correctly assserts that Petitioner received an adverse determination on the merits in his second habeas petition concerning claim E, ineffective assistance of trial counsel. See Hayton vs Anderson, No. 79-72921 (E.D. Mich

Mar. 24, 1980), aff'd, 636 F.2d 1217 (6th Cir. 1980), cert. denied, 450 U.S. 1002 (1981). Petitioner has failed to demonstrate that the ends of justice would be served by a redetermination of claims D and E. Therefore, the Court will not review those claims.

In addition to presenting two claims already raised in previous habeas petitions, Petitioner presents claims A, B, C, and F, concerning jury instructions, res gestae witnesses, and ineffective appellate counsel, which allege new or different grounds for relief than those claims raised in the two prior petitions. Claims A, B, and C could have been raised in the first petition because they concern trial matters which were or should have been known to Petitioner at that time. Furthermore, Petitioner cannot contend that claim F was unknown to him at the time he filed his second petition because he had already presented it to the Michigan appellate courts. See Michigan Court of Appeals, Docket No. 78-3705, and Michigan Supreme Court, Docket No. 62394. The United States

Supreme Court has held that where an habeas applicant has brought new or different grounds for the first time in a second petition which were presented to the state courts before the first petition was filed, he cannot claim that the grounds were unknown to him at the time he filed the second petition. Antone vs Dugger, 465 U.S. 200, 206 (1984).

While it has not been shown that Petitioner deliberately failed to raise claims A,B,C and F in either his first or second habeas petitions, it is clear that he was at the very least "inexcusably neglectful" in omitting those claims. Petitioner has failed to demonstrate by a preponderance of the evidence that the omission is excusable. Therefore, the Court finds that Petitioner has aubsed the writ. He has received due process and had his day in court on numerous occasions. Accordingly,

IT IS ORDERED that the petition for writ of habeas corpus is DISMISSED.

IT IS FURTHER ORDERED that Petitioner's motion for evidentiary hearing is DENIED.

John Feikens
United States District Judge

Dated: May 22, 1989

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 89-1718
D.C. No. 88CV-72323

JAMES EDWARD HAYTON,
Petitioner-Appellant,

vs

HENRY GRAYSON,
Respondent-Appellee,

Before; panel of Judges, Sixth Circuit Court of Appeals

Petitioner, James Edward Hayton, appeals a judgment of the district court which dismissed his petition for a writ of habeas corpus. He now moves for a certificate of probable cause pursuant to Fed. R. App. P. 22(b).

On June 13, 1979 after a jury trial, petitioner was found guilty of first degree felony murder and was sentenced to a term of life imprisonment. After the unsuccessful conclusion of his direct appeal and numerous proceedings for post-conviction relief in state court, he filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 in the District

Court for the Eastern District of Michigan. In the support of his request for that relief, he maintained that his conviction was invalid because: 1) the trial court had failed to instruct the jury as to the elements of armed robbery, the predicate felony giving rise to the charge of felony murder; 2) the trial court had failed to instruct the jury as to the possible uses of direct and circumstancial evidence; 3) the prosecution had failed to endorse and produce res gestae witnesses at trial; 4) he had not been provided with a transcript of the voir dire of the jury; and 5) he did not receive effective assistance from either trial or appelate counsel. The district court did not address the merits of those claims, however, due to petitioner's having previously maintained two unsuccessful actions for federal habeas relief. As petitioner had either raised or could have raised those same allegations during the course of those prior proceedings, the district court concluded that the current petition was a successive petition in violation of Rule 9(b), Rules Governing

Cases Under Section 2254. The district court therefore dismissed the petition for a writ of habeas corpus and petitioner filed this appeal.

Based upon a review of the record, the court concludes that the district court did not abuse its discretion in dismissing the petition for habeas relief. Accordingly, it is ORDERED that the application for a certificate of probable cause be and hereby is denied.

_____
Leonard Green, Clerk

Filed: Sept. 25, 1989